

Assessing Economics Damage in Personal Injury and Wrongful Death Litigation: The State of New York

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Abstract

Contributors to the *Journal of Forensic Economics* are compiling a state-by-state series of papers on how economic damages are assessed in personal injury and wrongful death cases. This paper discusses the rules of the court, the court system, and case law for the state of New York. New York's system is unique in several important ways. The state has passed statutes that specify in some detail both the method to be used to calculate damages and how a jury's verdict is to be transformed into a judgment. New York Civil Practice Law & Rules (CPLR) Articles 50-A and 50-B provide for separate and different treatment of medical malpractice cases and for all other standard torts, respectively. As a result, the damages sections of the two statutes provide specific guidance to the economic expert. Further, except in medical malpractice death cases, New York is different from other states in that its court does not require testifying economic damages experts to discount to present value. This paper discusses these issues and others to familiarize economic damages experts with the relevant court rules and rulings, as well as accepted practice, when performing economic damage appraisals in the state of New York.

I. Introduction¹

This paper discusses the court system, relevant statutes, and case law regarding the assessment of economic damages in personal injury and wrongful death cases for the state of New York. It also provides a description of impor-

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¹These papers are part of a series being prepared on economic damages in personal injury and wrongful death cases by state. A description of this series appeared as Robert A. Male and James D. Rodgers, "Introduction," *Journal of Forensic Economics*, Vol. 15, No. 3, Fall, 2002, pp. 317-18. Prospective authors of a paper for the series should consult that introduction and contact Male and Rodgers for information about the sequence of steps in the development and submission process, and also about papers already being developed or reviewed.

Papers treating Pennsylvania, Florida, Oregon (*JFE* 15:3), Wyoming and Missouri (*JFE* 16:1), Puerto Rico and West Virginia (*JFE* 16:3), Mississippi and Georgia (*JFE* 17:1), Ohio and Kentucky (*JFE* 17:2), California and Idaho (*JFE* 17:3), Kansas and Utah (*JFE* 18:2-3), North Carolina and Connecticut (*JFE* 19:1), Tennessee and Alabama (*JFE* 19:3), Texas (*JFE* 20:1), Illinois and South Dakota (*JFE* 20:3), and Alaska and New Jersey (*JFE* 21:2) have appeared.

tant aspects of how experts calculate and testify about economic damages. One of the key distinctions of New York court requirements is that, in non-medical malpractice personal injury and wrongful death, aggregate damages are presented and are not discounted to present value. In medical malpractice personal injury, aggregated past damages are presented but future damages consist of current dollar amounts and years of loss and growth rates without aggregate totals. In medical malpractice wrongful death cases commencing on or after July 26, 2003, discounted aggregated damages are presented. Pattern Jury Instructions (PJI) 2:320 deal with wrongful death in medical malpractice commencing on or after July 26, 2003 while PJI 2:320A deals with medical malpractice wrongful death commencing before July 26, 2003. We discuss these and related issues to familiarize readers with the relevant court rules, case opinions, and standard practices of those performing economic damage appraisals in the state of New York.

The structure of the paper is as follows. Section II provides an overview of the New York court system. Section III and Appendix B review New York Civil Practice Law & Rules (CPLR) Articles 50-A and 50-B. These articles apply to post-verdict calculations, a unique aspect of New York law, which guide how testimony is presented and, in turn, help determine how damages calculations are analyzed in expert reports. Section IV discusses the calculation of damages that pertain to wrongful death. Sections V focuses on the calculation of economic damages in injury matters. Our discussions address specific aspects of damages appraisal such as worklife, earnings capacity, and personal consumption deductions. Section VI addresses valuation of lost household services. Section VII addresses hedonics damages and Section VIII touches on claims made by undocumented aliens. Section IX discusses pre and post-judgment interest. Section X discusses some important aspects of New York rules regarding communicating an expert's opinion. This section also covers collateral sources and their treatment by the courts. Section XI provides a brief summary. Whenever actual practice sheds light on a particular topic, the authors share their experiences.

II. Overview of the Court System

For the purposes of litigating damages, the New York judicial system consists of the Courts of Original Instance, which are the trial courts. The county Supreme Courts are where most trials in which damage experts testify are held. The Court of Claims is the trial court for cases against the state of New York and its agencies; cases are decided by bench trial. The Court of Appeals is New York's highest court consisting of the chief judge and six associate judges. There are four Appellate Divisions of the Supreme Court, one for each of the four Judicial Departments in the state. The Intermediate Appellate Courts are the appellate terms for the Supreme Court's 1st and 2nd Departments that represent the New York City area.²

²See <http://www.courts.state.ny.us/courts/>.

III. CPLR Articles 50-A and 50-B

A. Distinctions Between the Two Articles

In New York, the Legislature adopted CPLR Article 50-A in 1985 to require that certain money judgments in medical, dental, and podiatric malpractice actions (henceforth, medical malpractice) be paid over a period of time through “structured” plans. (L 1985, ch 294, § 9.) In 1986 the Legislature adopted CPLR Article 50-B, which applied essentially the same requirements to most other tort actions. (L 1986, ch 682, § 9.) These had the effect of ending the practice of giving the trier of fact a calculation of the present value of economic damages. [CPLR 4111(f)].

An overhaul of the structured judgments provisions occurred in 2003 when the Legislature revised Article 50-A (L 2003, ch 86, § 4.) Included among the changes was a provision that all damages in wrongful death medical malpractice actions be discounted to present value. These revisions apply to medical malpractice actions commenced on or after July 26, 2003. (L 2003, ch 86, § 4.) No similar revisions were made to Article 50-B.

Based on these article amendments, the 2009 Pattern Jury Instructions (PJI 2:320 Damages—Action for Wrongful Death and Conscious Pain—Actions Commenced on or after July 26, 2003) were extensively revised. PJI 2:320 only apply to wrongful death in medical malpractice. They do not apply to personal injury in medical malpractice or to any personal injury and wrongful death not due to medical malpractice.³ For all claims filed after that date, economic loss in medical malpractice wrongful death cases must be given as an aggregate amount discounted to present value. The PJI 2:320A provides a note in a comment stating that Article 50A and 50B are inapplicable to wrongful death actions commenced on or after July 26, 2003. This statement has caused some confusion as to whether non-medical malpractice wrongful death cases should also be discounted. CPLR 4111f clarifies this. If the jury determines that losses are to be compensated in non-medical malpractice wrongful death cases, then the aggregate total award must be expressed without reducing it to present value. In non-medical malpractice injury and wrongful death cases under 50-B and 50-A prior to July 26, 2003, the economic expert testifies separately to past and future aggregate economic damages without discounting to present value. Economic testimony typically includes annual growth increments (if warranted) even though discounting does not occur. The period of years that future damages are to be incurred is also presented.

With the revision of 50-A, an economic damages expert is no longer permitted to testify (except in wrongful death medical malpractice) about aggregate total losses in medical malpractice trials (dealing with personal injury, not death) and yet is prohibited from discussing present value. Instead, for each component of future losses, the expert is required to provide the annual value of the loss in current dollars, the growth rate for each component of damages,

³Though the statutes were revised in 2003, it has taken some time for lawyers to absorb the changes in their practice and for the courts to understand and apply the new rules. This may explain why the instructions regarding damages calculations in the PJI were not changed until 2009.

and the number of years those amounts will continue. For example, the expert's opinion might be presented as follows: Mr. Smith's earning capacity in 2011 was \$47,000, and would increase at an average annual rate of 3.5% for 20 years. If the jury were to agree fully, it would return as its verdict award the same phraseology.

Earning losses typically would be for the number of years of worklife expectancy; household services losses would be projected over the remaining life expectancy or healthy life expectancy where appropriate. A life care plan would typically be for life expectancy or what remaining life expectancy may be stated in the life care plan.

The following table summarizes the calculation requirements for economic damages under New York law:

New York State Civil Litigation Summary of Economic Damages		
	Standard Negligence Cases	Medical Malpractice Cases
Injury Claims	<p>Lump-sum totals presented for past losses.</p> <p>Total Future Losses presented undiscounted.</p> <p>No income tax deduction.</p> <p>Subject to post-verdict 50-B</p>	<p>Lump-sum totals presented for past losses.</p> <p>Give current year dollar amount.</p> <p>Give Growth Rate.</p> <p>Give number of years the loss will continue from the date of trial.</p> <p>Income tax liability determined by judge (who may ask expert for input).</p> <p>Subject to post-verdict 50-A</p>
Death Claims	<p>Same as for Injury Claims.*</p>	<p>Lump-sum totals presented for past losses*</p> <p>Present value of total future losses.**</p> <p>Jury determines income tax liability but can ask the economist what that amount is.</p>

*The PJI contains a comment that all wrongful death claims must be presented as a lump-sum value. The relevant CPLR does not have such an explicit statement.

**There is ongoing controversy over the wording of the statute. A number of New York attorneys continue to ask us to present lump-sum damages in both undiscounted and discounted form.

Appendix A shows verdict sheets from the pattern jury instructions which demonstrate the unusual features of New York law. It should be noted that the verdict sheets in the PJI are just a template and in practice they are developed specific to each case by the judge in consultation with the participating attorneys. The economic expert's testimony utilizes totally different methods, depending on the nature of the action. The first verdict sheet in Appendix A is the older version that applied to both 50-A and 50-B cases [Special Verdict Form PJI 2:301 SV-I and PJI 2:151A (1) SV-I], and which continues to apply to non-medical malpractice personal injury damages claims.

Note that experts testify to all past and future damages in total nominal aggregate terms without any reduction of future damages to present value.

The second verdict sheet in Appendix A is for medical, dental, and podiatric malpractice cases instituted on or after July 26, 2003; it has a radically different verdict form than previous medical malpractice cases for future losses [Special Verdict Form PJI 2:151A (2) SV-II (CPLR 50-A)]. Medical malpractice wrongful death is excluded in this verdict sheet.

Medical malpractice pattern jury instructions [PJI 2:151A(2)] discuss economic testimony when dealing with damages that commence in the future rather than at the time of verdict or whether the damages are permanent for life of the plaintiff or whether future damages will change at some date in the future. This may include future pension losses or life care costs that change in the future. One example is the case of an infant whose lost earnings will commence at some future date. The third verdict sheet in Appendix A shows the instructions for this.

Future Medical Malpractice Wrongful Death

CPLR 4111(d) deals with medical malpractice and states:

In itemizing amounts intended to compensate for future wrongful death damages, future loss of services and future loss of consortium, the jury shall return the total amount of damages for each such item.

Yet PJI 2:320 states:

For that reason, you must reduce the amount which you find AB would have contributed each year from (his, her) earnings to the support of [*list the distributees by name*] to its present cash value in order to make allowance for the earning power of the money.

To further confuse matters, PJI 2:320 states [In actions subject to CPLR 4111(d, e, f)]:

1. State the total amount of economic loss, if any, to each of [*list the distributees by name*] resulting from AB's death. [*In cases tried in the Second Department, substitute: State the total amount of economic loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of economic loss for each individual*]

2. For each person for whom an award is made in your answer to question no. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation.

Legal observers have commented that there is an obvious conflict between the statute and the pattern jury instruction. In practice, we have been asked by attorneys to calculate future losses in medical malpractice cases both ways, i.e., giving total future losses and also giving discounted future losses. Were the case to go to trial, motions and rulings would guide the damages expert in the preferred method of presenting findings to the trier of fact.

In writing reports, an economic damages expert should attempt to anticipate the manner in which the jury is expected to render a verdict on damages. If the jury is required to submit an annual amount of loss in current dollars, then the expert's report should contain that form of opinion. In practice, an expert should discuss what the retaining attorney needs. If a report were to contain only the annual amount of loss, a growth rate, and the number of years of loss, the attorney and client would not know the value of the total damages. We have found that most attorneys, looking to the possibility of settlement, also want our reports to include total aggregate loss amounts as well as the yearly current amount that would be used at trial. Some also request a present value amount in all tort cases for purposes of settlement negotiations.

B. Post-Verdict Mechanics CPLR Articles 50-A and 50-B

Once a jury has rendered its verdict as described above, the verdict must then be "translated" into monetary amounts to be awarded to both the attorney (in a lump sum) and the plaintiff (in the form of a lump sum and structured payments). For this purpose, detailed rules are provided in both 50-A and 50-B. CPLR 2:277 has detailed explanations of these rules. Because many if not most economists reading this paper will not have New York's CPLR, we will provide an explanation of the post-verdict procedure in Appendix B. However, it should be noted that the economist who testified at trial may or may not be used to performing the post-verdict calculations. In essence, once you complete your testimony, you are finished. It is up to your retaining attorney to ask you to perform the post-verdict structure should one be required. The attorney may use the annuity company to do the post-verdict calculation. The post-trial verdict portion of damages in New York has been characterized as follows by former Chief Judge Kaye of the Court of Appeals of New York: "The structured judgment provisions have deservedly been labeled 'circuitous', 'vexing', 'as every Judge's nightmare', 'and at best *** ambiguous which can lead to inexplicable results.'" (*Bryant v. New York City Health and Hospital*, 1999, p. 5)

Part of the structuring process involves post-verdict negotiations by both sides. While an economic damages expert may be asked to assist in the structuring process, often the annuity company that sells the annuity will present the methodology. The expert may be asked to work with the annuity insurance company's representative to corroborate their results. The court does not have to provide a structure if the parties reach a post-trial agreement. If both par-

ties agree to skip the 50-B hearing, that would be permissible (*Blythe v. Lonero Transit*, 2002). The agreement can be a lump-sum payment with some type of structure or anything the parties agree to. Often the negotiations revolve around determining the structure of the annuity and the discount rate. The law requires the judge to structure the settlement if the two sides cannot reach an agreement.

The 50-B statute leaves it to the courts to determine the discount rate. Different courts have applied different discount rates based on different factors. *Rodgers v. 72nd Street Associates* (2002) and *Desiderio v. Ochs* (2003) did not allow the annuity market discount rates or mortality adjustments to be used. *Reliant Airlines v. Broom* (1995), *Blythe v. Lonero et al.* (2002), *Rodgers v. 72nd Street Associates* (2002), and *Bermeo v. Atakent et al.* (1998) encouraged the parties to work together to present a structure and interest rate to the court. The courts often instruct the parties to present a unified structure and suggested discount rate to the court. The attorney sometimes asks the economic damages expert to assist in meeting the judge's request. Often, both plaintiff and defense experts communicate in order to provide the judge with a unified structure and discount rate. Ultimately, the county clerk must verify and approve the final figures. We have found that damages experts sometimes are contacted by attorneys to evaluate a damages structure of payments before submission to the court. Both authors have been retained periodically to assist attorneys in making these calculations.

For a more detailed discussion of how the entire 50-A and 50-B process works, see Spizman and Schmitt (2000) and Spizman, Schmitt, and Floss (2004).

IV. Economic Damages in Wrongful Death Cases

Survivors of the decedent may claim pecuniary losses. For example, with respect to claims for loss of financial support, the Pattern Jury Instructions state the following:

You must decide what portion of (his, her) earnings AB would have applied to the care and support of (list the distributees by name). In making your decision, you must consider the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that (he, she) contributed to the support of (list the distributees by name) and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings....(PJ12:320)

“Fair and just compensation” for pecuniary injuries resulting from the decedent's death may be claimed. Beyond future earnings and pension income, such compensation could include reasonable expenses for medical aid, nursing care, and funeral expenses and other lawful elements (Estate Powers and Trust Law, Article 5, Part 4, EPTL 213-217). In addition, pecuniary loss may include the reasonable value of benefits that would have been received for

household services, as well as parental training, guidance and counsel services that would have been provided to the surviving children claimants had the decedent lived. In our experience, the majority of plaintiff attorneys request us not to include measures of lost parental guidance services since they prefer to use their persuasive powers and appeals for sympathy to argue before the jury for “just compensation” for the loss of the parent. We have been told that juries often assign from \$500,000 to a \$1,000,000 to this element of damages, a value that far exceeds what an economic damages expert could reasonably calculate in purely economic terms.

A. Earnings Capacity and Expected Earnings⁴

New York law lists lost earnings and impairment of earnings ability as different items of damages [CPLR Rule 4111(f)]. However, PJI 2:290 states:

Although CPLR 4111 (d) and (f) refer to “loss of earnings” and “impairment of earning ability” as separate items of damage, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of past damages or to identify both as separate items of future damages.

Based on our experience, evidently because of PJI 2:290, either earnings capacity or expected earnings may be used in the expert’s analysis of lost earnings, depending on case-specific facts. Of course, for homemakers or students, measures of earnings capacity would be more appropriate. When a decedent is a business owner, the analyst must develop a reasonable basis for measuring lost earning capacity. There is a significant distinction in the case of a self-employed person between the profits of the business and the person’s earning capacity (See *Behrens v. Met. Opera Ass’n*, 2005). In most situations, business profits will depend on both the individual’s labor and expertise and on invested capital. Claims for lost support must focus on labor earnings and not capital.

Standards for earnings loss calculations are not specified with any particularity in the law, but experts traditionally follow generally accepted practices such as using the decedent’s work history, labor union agreements, and earning capacity. In all wrongful death cases, a personal consumption adjustment must be made to arrive at a loss estimate to surviving family members.

In addition to lost earnings, other forms of compensation that may have been lost to claimants should be calculated. Thus, fringe benefits such as health insurance, 401k matching contributions from employers, and other employee perquisites could be included in the damages report.

B. Worklife and Life Expectancy

As in most other states, New York rules on civil damages do not delve into the details of the necessary calculations. Pattern Jury Instructions Appendix B

⁴Lettered subheadings in this section are organized to match the statute subheadings.

includes life expectancy data. Though regularly updated, its data always seem to lag behind currently available data. In our respective practices, we access the latest government life expectancy figures and use them in our economic loss calculations.

Pattern Jury Instructions Appendix A provides the out-of-date worklife expectancy tables developed by Shirley Smith, Bureau of Labor Statistics (BLS) Bulletin 2254 (1986) which relied on 1979-80 data. Although legislators change the life tables every so often, it is impossible for them to change Bulletin 2254 because it has never been updated. However, use of Bulletin 2254 is not required:

Although as official compilations, the Department of Labor tables may be judicially noticed, the preparation of any such tables involves judgment in the gathering of the underlying statistics that may affect the reliability of the table in relation to the fact situation before the court. Expert testimony concerning the reliability of the Department of Labor table, may, therefore be offered, and with respect to a privately prepared table, expert testimony would be required to allow the table to be used as a basis for an opinion. (PJI 2:290)

We have testified many times without objection using privately-prepared worklife expectancy tables by Ciecka, Donley, and Goldman (2000-2001) and Skoog and Ciecka (2001) in lieu of Bulletin 2254 BLS tables. Other economists may choose to use other worklife expectancy tables or more current iterations of the Markov Increment-Decrement Model.

Both worklife and life expectancy are to be measured from the time of the incident, not the date of trial or commencement of the case. (See PJI 2:290.) Further, awards should not be reduced by any reduction of expectancy resulting from the causal accident.

C. Increasing Earnings by Growth Rate

The expert provides a growth rate for each element of damages. Earning capacity growth rates can be established from applicable industry wage trends. There is no fixed rule. For example, if a worker's union has been negotiating 3% annual wage increases under several sequential labor agreements, it would be reasonable to apply that rate for future growth. The jury in wrongful death (either medical malpractice or non-medical malpractice) will hear testimony about growth rates and incorporate that into its conclusion into the verdict sheet.

D. Taxes

Federal, state, and local income taxes are to be ignored in the calculation of lost earnings and benefits under CPLR Article 50-B. (See PJI 2:320 Income Taxes on Lost Earnings.) This practice is in keeping with many other court jurisdictions that instruct jurors not to consider income tax liabilities when determining losses to surviving claimants. Citing *Johnson v. Manhattan & Bronx*

Surface Transit Operating Authority (1988), here is the wording in PJI 2:320 on income taxes: "Absent an express statute to the contrary, the earnings considered in a wrongful death action are ascertained by reference to decedent's gross earnings and no deduction is to be made or consideration given on account of income taxes." (p. 1606)

With the July 25, 2003 changes in medical malpractice in Article 50-A, consideration of income taxes were specifically introduced. Although the statute does not expressly mandate an adjustment in the award, it does invite the fact-finder to exclude the amount that otherwise would have been paid in taxes by the decedent from the sums available for support of the distributees:

In any action for medical, dental or podiatric malpractice where the plaintiff seeks to recover damages for loss of earnings or impairment of earning ability, evidence shall be admissible for consideration by the court, outside of the presence of the jury, to establish the federal, state and local personal income taxes which the plaintiff would have been obligated by law to pay. (CPLR §4546[1])

50-A further elaborates:

In any such action, the court shall instruct the jury not to deduct federal, state and local personal income taxes in determining the award, if any, for loss of earnings and impairment of earnings ability. The court shall further instruct the jury that any reduction for such taxes from any award shall, if warranted, be made by the court.... In any such action, the court shall, if warranted by the evidence, reduce any award for loss of earnings or impairment of earnings ability by the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the plaintiff would have been obligated by law to pay. (CPLR §4546[1])

Pattern Jury Instructions 2:290 discuss taxes when death is a result of medical malpractice:

However, where the patient died as a result of the medical or dental malpractice and a wrongful death action is brought, the jury is to be instructed to consider the effect of income taxation on the amount of decedent's earnings that would have been available to support the beneficiaries of the action.

PJI 2:230.1 further states:

In determining what portion of AB's earnings would have been available to the support of (list of the distributees by name), the law requires you to consider the effect of income taxation on AB's earnings. This is the reason why during the trial evidence was received as to the amount of federal, state (and local) income taxes AB would have been legally required to pay on the income AB would have received had (he, she) not died ... If you conclude that you cannot make any finding with

reasonable certainty as to the amount of decedent's tax liability, then do not consider the issue of income taxation any further.

E. Treatment of Fringe Benefits

Whenever possible and applicable, the courts have allowed the replacement value of lost benefits to be used. In cases concerning a child or new entrant into the labor market, broad percentage averages may be used to represent likely fringe benefits the individual would have received. The focus typically is not the employer's cost of particular benefits that have been lost as a result of the injury but the market replacement cost of a comparable benefit. Of course, for some benefits such as employer 401(k) matching contributions, the employer's cost is identical to the replacement cost.

Defined benefit pension losses should be properly calculated by using the pension plan's formula to determine the value of future lost pension benefits. When such information is not available to the analyst, the second best approach would be to assign a percentage of earnings to account for the value of the loss. Future pension losses in medical malpractice cases should follow special verdict form PJI 2:151A (2) if there is evidence that the pension will change at some date in the future.

F. Personal Consumption Deduction

In wrongful death cases, personal consumption is deducted from lost earnings estimates. Courts expect a reasonable foundation for the personal consumption value used by the expert, be it reference to accepted methods or citation to literature.

G. Other Issues

Other aspects in the calculation of damages in death cases include the following:

1. When calculating lost financial support to surviving children, PJI 2:320 indicates that the age of support for children is to age 21 even though the law treats the age of majority as 18.
2. The jury is not to consider the surviving spouse's remarriage (PJI 2:320).
3. "As in the case of other next of kin, the jury may take into consideration the probability that decedent's estate would have been augmented by earnings and the child's inheritance thus increased" (PJI 2:320).
4. Funeral expenses are recoverable in a survival action (EPTL 11-3.3; PJI 2:320).
5. There are special considerations for undocumented persons (see Section V.F. below).

V. Economic Damages in Personal Injury and Impairment Cases⁵

A. Earnings Capacity and Expected Earnings

As we discussed above, PJI 2:290 says either earning capacity or expected earnings is acceptable to the courts as a measure, depending on the facts of a particular case. If the injured party is a minor child, the youngster's future earning capacity may be considered (PJI 2:290). For infants with no schooling records established, the analyst may want to offer several scenarios of lifetime earnings over the age-earnings cycle based on available statistics. Co-author Spizman prefers to model family background information in order to estimate future expected earnings of the child (Kane and Spizman, 2001).

Under the general duty to mitigate losses (PJI 2:290), injured persons are expected to attempt to minimize the damages resulting from a loss of earnings. The court in *Camdine v. the State of New York* (2008) said:

It is also well-settled that an injured claimant seeking recovery for loss of earnings has a duty to mitigate damages by seeking vocational rehabilitation and alternative employment (*Beadleston v. American Tissue Corp.* (2007); *Murphy v. Columbia Univ.* (2004), *Thompson v. Port Auth. of NY & NJ* (2001); *Bell v. Shopwell, Inc.* (1986); *McLaurin v. Ryder Truck Rental* (1986). (p. 16)

The standard for earnings loss calculations as stated above in wrongful death (Section IV.A.) follows generally accepted practices. In standard negligence cases, since discounting is not applied until after a jury award, an analyst's projected values can be substantial in 50-B situations, especially if several decades of losses are projected after accounting for annual earnings growth, which is allowable. Loss of pension benefits comprises a notable and interesting component of such calculations under New York law. Like other calculated components of non-medical malpractice loss, lost pension benefits are not expressed in present dollar terms. This is especially significant since pension payments that would have been received many years in the future are actually worth much less in present value terms. Though it is seriously misleading in economic terms to state such losses in nominal terms, New York law provides for exactly that.

B. Worklife and Life Expectancy

As explained above regarding death cases, the latest published data on worklife and life expectancies may be applied in the calculation of economic losses.

C. Increasing Earnings by Growth Rate

The jury in medical malpractice personal injury will weigh the testimony of the expert on growth rates and decide the growth rate as well as the current

⁵Lettered subheadings in this section are organized to match the statutes subheadings.

annual value of earnings and the number of years over which the loss would continue.

The expert determines the growth rate based on what is deemed appropriate for each individual case. Future earnings projections should be based on clearly delineated arguments and data. For example, upon receiving the current dollar values of a life care plan from the life care expert, the economic expert will also provide testimony about future growth rates of the components in the life care plan. The jury will use that testimony as guidance in establishing the growth rate, the current dollar value, and amount of time the loss will occur. Also, as noted earlier, no discounting to present value is permitted under civil court rules. This is true for any type of injury case, even in cases of medical malpractice, except wrongful death.

D. Taxes

Income tax liabilities are not to be considered in the calculation of pecuniary losses in New York State except in medical malpractice claims in which the judge may modify the jury award to take into account income taxes. The economic damages expert does not testify to income taxes before the jury in medical malpractice injury matters. However, the expert should be ready to present what the marginal and effective tax rate would be should the judge ask outside the presence of the jury.

E. Treatment of Fringe Benefits

Fringe benefit losses are determined essentially the same way in personal injury as in wrongful death, as already discussed. Again, in medical malpractice cases, the annual value of loss, the rate of annual increase, and the number of years of projected losses are to be presented to the jury. In regular injury cases, total undiscounted fringe benefit loss values are presented.

Sometimes injured parties continue to receive certain benefits. Thus, the economic damages expert must sort out what had been provided pre-injury and determine the net loss of benefits after taking into consideration any receipt of post-injury benefits. Whenever possible and applicable, the courts have allowed the replacement value of lost benefits to be used. In cases concerning a child or new entrant into the labor market, broad percentage averages may be used to represent likely fringe benefits the individual would have received.

VI. Household Services in Injury and Death Cases

With claims for a loss of ability to perform household services, there has been a fair amount of controversy and alternative court interpretations. Appendix C cites a number of key cases and the substance of the issues. What is well established, however, is that a foundation must be established that the plaintiff did provide household services pre-injury and is no longer able to perform those services post-injury at the same level. In reality, this requirement

applies to any and all claims for losses, be they earnings or services. Proof of payment made to replace such lost services is not required.

It is important to stress that in order to make a claim for lost household services, a prima facie case must show a loss of household services by demonstrating the plaintiff performed household services. In practice, attorneys may request that the economic damages expert ignore the household service component because either a foundation is lacking or the value of the loss is so small the attorney does not want to appear to be seeking extras losses for the complainant. Whether an economic damages expert is to estimate lost household damages in any given tort case should be discussed with the retaining attorney.

Schultz v. Harrison Radiator Div. Gen. Motors Corp (1997) has been very controversial as to whether or not an actual expenditure for past household services is required. Appendix C discusses this controversy. Attorneys often will ask to ignore past household services and commence losses for the future.

VII. Hedonic Damages

Economic expert testimony is not allowed with respect to hedonic damage claims such as "loss of enjoyment of life." Such claims are viewed as belonging under general damages (pain and suffering, etc.) and would not be considered by New York courts to be the proper subject of an economic damages expert. When a jury made a separate award for loss of enjoyment of life, the Appellate Division in *Golden v. Manhasset Condominium* (2003) refused to allow the award as a separate element of damages. This ruling is consistent with another earlier Appellate Division ruling that also did not allow a separate award for normal pursuits and pleasures of life (see *Kachnic v. Tiedeman et al.*, 1990).

VIII. The Case of Undocumented Aliens

In recent years, co-author Tinari has been retained in an increasing number of cases involving injuries suffered by undocumented aliens. In 2006, the New York Court of Appeals in *Balbuena v. IDR Realty* (2006) held that undocumented aliens were not precluded from recovering lost wages in personal injury litigation. However, by way of illustrative dicta, the decision permitted knowledge of the claimant's citizenship status, or any changes therein such as application for work authorization documents, to be disclosed to the jury. In addition, an undocumented alien may be precluded from recovering damages for lost wages if the plaintiff had submitted false documents to obtain employment and if the employer was not aware of the worker's undocumented status.

Courts have clearly held that loss of earnings must be established with reasonable certainty. (See, e.g., *Faas v. State of New York*, 1998 and *Ortiz v. Leak*, 1995.) Such cases have a number of damages issues that are potentially problematic. Many illegal aliens do not submit annual income tax filings, though they may be on W-2s with, in most cases, false Social Security numbers. In such cases, it is at least possible to confirm annual earnings via the W-

2 statements. Others are employed strictly for cash, thereby providing no documentation for earnings. When this is the case, the economic damages expert must pursue other proofs of earnings from the plaintiff or employer(s) or proof of expenditures such as rent and utility payments. Unless severely impaired, the plaintiff would be capable of testifying and answering questions regarding his or her past earnings and expenditures. (See *Balmaceda v. Perez*, 1992.) Most plaintiff attorneys recognize that such cases do not present a sympathetic picture to juries.

An added problem is the potential for deportation. There is some likelihood that authorities will take steps to return the plaintiff to the country of origin. Kelner and Kelner (2006) discuss how national data on the incidence of deportation show that the percentage is remarkably small, being in the single digits. One approach for valuing damages, then, could be application of the deportation probability to the estimated stream of lost income. In some cases, co-author Tinari has been asked to make two sets of calculations: one assuming continued residency and earnings in the United States and a second assuming earnings in the home country. We recommend that the economic damages expert, as in most aspects of his or her assignments, work closely with the retaining attorney regarding assumptions and scenarios that would be reasonably applicable in each case.

IX. Pre and Post-Judgment Interest

Statutory interest of 9% shall be recovered on the total award from verdict, report, or decision to judgment (CPLR §5002). Every money judgment shall bear interest from the date of its entry (CPLR §5003).

X. Practice Guidelines

A. Exchanging Economic Reports

New York does not require that economic loss reports be exchanged with opposing counsel. What is required is exchange of the names and backgrounds of any experts planned to be used by each side and the essence of the experts' opinions. The opinions of economic damages experts and the bases for those opinions are generally presented in document CPLR 3101(d), issued by the plaintiffs' attorneys to convey the elements and magnitude of the claimed damages and the essence of the experts' testimony. Defendants also file a 3101(d) Exchange for each expert, indicating what their expert will be expected to testify to and the bases of those opinions. In some cases, the experts will not see the 3101(d) since it is exchanged between the lawyers for both sides. In some instances, especially more complex cases or those in which there are a number of elements of damages being computed, co-author Tinari has been asked to work closely with the attorney in formulating proper wording of the 3101(d) text.

It is our view that, by not revealing the detailed work typically contained in an expert report, plaintiffs gain a strategic advantage. For those cases that

eventually go to trial, expert testimony is presented by the plaintiffs' experts, based on whatever work was done to arrive at the expressed opinions. Some plaintiff reports can be one page with summary statistics and can be submitted 30 days prior to trial. Since the details of the presentation are not shared with the defense side ahead of time, we have seen defense attorneys in the courtroom scramble to come up with effective cross-examination questions. Some observers have characterized this as "trial by ambush" since a full report does not have to be disclosed prior to trial.

Nevertheless, we have worked with many New York attorneys who do, in fact, choose to exchange with their adversaries the written report prepared by their experts. We believe that this approach mimics federal court requirements and is more effective since it lays everyone's cards on the table, leading to quicker and more frequent settlements.

Under the rules of the process just outlined, depositions are not typically taken of economic damages experts. An examination before trial (EBT) is often conducted with respect to fact witnesses. Rarely do experts get examined or deposed in New York tort cases.

B. Economic Expert Testimony at Trial

New York is a large state with different regional trial customs. Although the co-authors take engagements throughout the state, co-author Tinari generally testifies in the New York metropolitan area, known as downstate, while co-author Spizman generally testifies upstate. Providing documentary files to the court is an area where regional customs appear to vary. Even though jurors are not provided copies of documents relied upon by experts and jurors rely upon the oral testimony of experts, it has been co-author Tinari's experience that he is expected to bring his entire documentary file to court with him. Given that depositions are not taken of experts and that reports and file documents need not be exchanged, the opposing attorneys will want to examine the documents relied upon by the experts. Typically, in Tinari's experience, upon completion of the expert's direct testimony, the adversary attorneys will ask the judge for a break during which the expert's file documents can be examined. Trial testimony (with or without demonstrative charts) should be fully consistent with the documentary evidence in the file. Co-author Spizman has been asked infrequently to produce documentary evidence while testifying. Both authors write reports with full citations to all data used in their reports, but it is never known for certain if the entire report with the citations has been provided to the other side. For these reasons, both authors suggest that the economic damages expert bring documentary files of the relevant data to trial.

C. Collateral Income Sources and Kelly Calculation

Collateral income sources are generally not considered by economic damages experts [CPLR §4545, Pattern Jury Instructions (PJI) 2:300]. Rather, sources such as long-term disability income or Social Security disability benefits received after an injury are considered by the court in molding a jury's

award after the trial. There are some exceptions to this, outlined in both CPLR §4545 and PJI 2:300. Post-trial use of an economic damages expert occurs when the workers' compensation carrier has a lien against third party recovery. Workers' Compensation Law §29(1) requires that the compensation carrier contribute toward the litigation expenses incurred to get the recovery. These expenses include attorneys' fees and disbursements. The idea is that, since the carrier is relieved of paying future compensation payments, the carrier received a benefit and thus should share in the cost of getting the recovery.

The statute says the expenditures should be "equitably apportioned" by the court between the compensation carrier and plaintiff. The method of doing this is called a *Kelly Calculation* named after the principal case, *Matter of Kelly v. State Insurance Fund* (1983). There are situations in which a compensation carrier not only has the total lien extinguished by the "equitable apportionment" but the carrier's share of the litigation costs for the total benefit is greater than the existing lien. When this is the case, it is referred to as *fresh money*. In essence, the compensation carrier owes the plaintiff this fresh money because the carrier received a windfall when it did not pay its full share of the cost of litigation at the expense of the plaintiff. Co-author Spizman worked on the plaintiff side in such a calculation where fresh money was added in *Iacamp v. the State of New York* (2004).

XI. Summary

In this paper we have presented the basic guidelines and methods for the calculation of economic damages in personal injury and death cases in the state courts of New York. Depositions of the economic expert do not occur. While the old BLS worklife tables (Bulletin 2254) are mentioned in the pattern jury instructions, experts routinely use updated worklife tables that have been published in forensic economic journals. As explained, income tax deductions are not to be considered in the estimation of earnings losses except in medical malpractice wrongful death cases. Present value calculations are not presented at trial except in cases of medical malpractice wrongful death. A process for discounting, together with calculation of a lump-sum portion of the award as well as the amount of the attorney's fee, is incorporated in separate statutory CPLR Articles 50-A and 50-B. In particular, Article 50-A addresses medical malpractice claims and lays out the requirements of what is to be presented to the jury and what the jury must determine in its final award determination. The paper also discussed in some detail various issues surrounding the inclusion and calculation of claims for loss of household services.

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 Workers' Compensation Law §29(1)

Appendix A Verdict Sheets

1. Verdict Sheet for a Standard Tort Under Article 50-B and Medical Malpractice Under ARTICLE 50-A Prior to July 25, 2003.

Past Damages

- (1) State separately the amount awarded for the following items of damages, if any, up to the date of your verdict:
- | | |
|--|----------|
| (a) Medical expenses: | \$ _____ |
| (b) Dental expenses: | \$ _____ |
| (c) Loss of Earnings: | \$ _____ |
| (d) Impairment of earning ability: | \$ _____ |
| (e) Custodial care: | \$ _____ |
| (f) Rehabilitation services: | \$ _____ |
| (g) Pain and suffering up to the date of your verdict: | \$ _____ |
| Total: | \$ _____ |

Future Damages

- (2) State separately the amount awarded for the following items of damages, if any, from the date of your verdict to be incurred in the future:
- | | |
|-----------------------|----------|
| (a) Medical expenses: | \$ _____ |
| (b) Dental expenses: | \$ _____ |

- (c) Loss of Earnings: \$ _____
- (d) Impairment of earning ability: \$ _____
- (e) Custodial care: \$ _____
- (f) Rehabilitation services: \$ _____
- (g) Pain and suffering, including the permanent effect of the injury, from the time of verdict to the time that plaintiff could be expected to live: \$ _____
- Total: \$ _____

Number of future years: _____

- (3) If you have made any award for amounts intended to compensate the plaintiff for damages to be incurred in the future, then for each item for which an award is made, state the period of years over which such amounts are intended to provide compensation:
- (a) Medical expenses: _____
 - (b) Dental expenses: _____
 - (c) Loss of Earnings: _____
 - (d) Impairment of earning ability: _____
 - (e) Custodial care: _____
 - (f) Rehabilitation services: _____
 - (g) Pain and suffering, including the permanent effect of injury _____

2. Verdict Sheet for Medical, Dental, and Podiatric Malpractice Commencing On or After July 26, 2003 Except Wrongful Death

Past Damages

- (1) State separately the amount awarded, if any, for the following items of damages, from the time of occurrence up to the date of your verdict:
- (a) Medical, dental, podiatric expenses: \$ _____
 - (b) Medical equipment: \$ _____
 - (c) Custodial care: \$ _____
 - (d) Rehabilitation services: \$ _____
 - (e) Loss of earnings: \$ _____
 - (f) Impairment of earning ability: \$ _____
 - (g) Pain and suffering: \$ _____
- (2) State the amount awarded, if any, for future pain and suffering: \$ _____
- (a) State the number of years the future pain and Suffering will continue: _____

Future Damages for personal injury (not wrongful death)

- (3) For each item of economic damages, if any, you find will be incurred in the future, state the following:
- (a) Medical, dental, podiatric expenses:
 - (i) the annual amount in current dollars: \$ _____
 - (ii) the number of years during which such expenses will be incurred: _____
 - (iii) the growth rate during those years: _____

- (b) Loss of earnings
 - (i) the annual amount in current dollars: \$___
 - (ii) the number of years during which such expenses will be incurred: _____
 - (iii) the growth rate during those years: _____
- (c) Impairment of earning ability:
 - (i) the annual amount in current dollars: \$___
 - (ii) the number of years during which such expenses will be incurred: _____
 - (iii) the growth rate during those years: _____
- (d) Custodial care:
 - (i) the annual amount in current dollars: \$___
 - (ii) the number of years during which such expenses will be incurred: _____
 - (iii) the growth rate during those years: _____
- (e) Rehabilitation services:
 - (i) the annual amount in current dollars: \$___
 - (ii) the number of years during which such expenses will be incurred: _____
 - (iii) the growth rate during those years: _____

- (4) Loss of earnings:
 - (i) the date of commencement of loss of earnings: _____
 - (ii) the annual amount in current dollars: \$___
 - (iii) the growth rate applicable to the period of years from the present date to the date on which the loss will commence: _____
 - (iv) the number of years the loss will continue: _____
 - (v) the inflation or growth rate during those years: _____

If the plaintiff will require custodial care for the rest of his or her life, then the following:

- (5) Custodial care:
 - (i) the annual amount in current dollars: \$___
 - (ii) the number of years during which custodial care will be required: _____
 - (iii) the growth rate during those years: _____
 - (iv) is this item of damage permanent for the life of the plaintiff? Yes___ No___

3. Verdict Sheet for Rehabilitation Services.

If there is a need for rehabilitation services that will change when the plaintiff reaches age 60 and then continues for the rest of the plaintiff's life, then these additional questions must be submitted.

- (6) Rehabilitation services to age 60:
 - (i) the annual amount in current dollars: \$_____
 - (ii) the number of years during which custodial care will be required: _____

- (iii) the growth rate during those years: _____
- (7) Rehabilitation services from age 60:
- (i) will the plaintiff's need for rehabilitation services change? Yes___ No___
- (ii) the annual amount in current dollars: \$_____
- (iii) the number of years those services will be required: _____
- (iv) the growth rate during those years: _____
- (v) is this item of damage permanent? Yes___ No___
for the life of the plaintiff?

Appendix B Post-Verdict Mechanics

A. Post-Verdict Mechanics CPLR Article 50-B

All damage awards in excess of \$250,000 must be structured by the judge under the guidelines of CPLR Articles 50-A (CPLR 5031-5039), passed in 1985, and 50-B (CPLR 5041-5049), passed in 1986. For the remainder of this paper, we will refer to 50-B to include medical malpractice claims filed prior to July 25, 2003, since they would be identical. When we talk about 50-A, we are referring to medical malpractice cases filed after July 25, 2003.

Under Article 50-B, all past damages plus the first \$250,000 of future damages are paid as a lump sum. One-third of this amount is a commonly encountered percentage that is paid to the attorney, with the plaintiff receiving two-thirds. (A medical malpractice attorney's contingent fee is based on a sliding scale.⁶) The methodology for determining the attorney's fee on the structured portion of the remaining verdict in 50-B is as follows. The first \$250,000 lump-sum future payment is subtracted from the total nominal future loss in proportion to the damage losses in each category (earnings, household services, medical costs, pain and suffering, etc.) as awarded by the jury. After subtracting each category's proportion of the \$250,000, the remaining future loss associated with each category of loss (earnings, household services, medical, pain and suffering, etc.) is divided by the number of years over which such payments shall be made to get the annual average loss (smoothing the future loss stream). The statute requires that the nominal amount of future pain and suffering must be paid out within a maximum of 10 years (or less, if the jury so instructs). After determining the first annual payment, each succeeding year should be increased by 4% per year for the entire loss period (even though the damages expert most likely included a growth or inflation factor).

For the purpose of determining the attorney's fees on the future losses, the year-by-year stream of augmented average annual payments is discounted to the present. One-third of the present value amount is allocated to the attorney as a lump-sum payment (*Rohring v. City of Niagara Falls*, 1994). The annual average of the remaining two-thirds of the undiscounted stream of payments constitutes the first year payment of an annuity that increases 4% per year. It should be stressed that this 4% additur is by sta-

⁶In medical malpractice actions, the attorneys' contingent fees shall not exceed the following sliding scale: 30% of the first \$250,000, 25% of the next \$250,000 followed by 20% of the next \$500,000 and 15% for the next \$250,000. The attorney will receive 10% for amounts over \$1,250,000. (N.Y. Jud. Law § 474-a) In other personal injury and wrongful death cases, the fee will usually be a third, but not invariably so.

tute and is not related to the prevailing interest rates. It is also in addition to the growth rate used by the economist in estimating damages. An annuity must be purchased (for each category of loss), payable on a monthly basis.

Economic experts retained to assist in these calculations should be aware that when a stream of payments is discounted to present value under 50-B, the resulting total value of the award is often very close in magnitude to the undiscounted value given during testimony. In fact, *Desiderio v. Ochs et al. and New York Hospital* (2003) allowed a structure using a literal application of the 50-B statute that was greater than the jury's future damages.

There are four reasons why this occurs: (1) requiring a \$250,000 lump-sum payment from future losses, (2) smoothing the future loss stream over the time period of loss, (3) applying a 4% annual increase even though the economist likely increased the annual values, and (4) truncating the pain and suffering award over a maximum 10-year period.

The first \$250,000 of payment can encompass losses several years into the future that are not discounted. Smoothing future losses by dividing the remaining future losses by the number of years recommended by the jury results in a biased set of larger values in the immediate ensuing future years, yielding larger present values.

The statute mandates that 4% should be added to the smoothed loss stream structure even after inflation has already been accounted for. The most recent legal challenge to this 4% additur was *Schultz v. Harrison Radiator* (1997). Citing past precedent the Court of Appeals (the highest court in New York state) allowed the post-verdict additur as well as economic testimony about inflation. The same court in *Bryant* again upheld the 4% adjustment of New York's articles 50-A and 50-B.

B. Post-Verdict Mechanics CPLR Article 50-A Medical Malpractice Personal Injury

For medical malpractice claims filed since July 26, 2003, new legislation of 50-A has dramatically altered how testimony is presented. While all past damages are still to be paid in a lump sum, the amount of future damages to be paid as a lump sum was increased from \$250,000 to \$500,000 [§5031(b)]. Future pain and suffering payment streams were also reduced. §5031(c) states:

As to any award of damages for future pain and suffering in excess of five hundred thousand dollars, the court shall determine the greater of thirty-five percent of such damages or five hundred thousand dollars and such amount shall be paid in a lump sum. The remaining amount of the award for damages for future pain and suffering shall be paid in a stream of payments over the period of time determined by the trier of fact or eight years, whichever is less.

Further, the second year payment for pain and suffering and each payment for succeeding years shall be computed by adding 4% to the previous year's payments.

Thus, the new 50-A provides a greater lump-sum amount for pain and suffering as well as a truncation to a maximum of eight years instead of 10. The 4% additur is applied to pain and suffering only, not to pecuniary damages, described as follows:

The findings of future economic and pecuniary damages except in wrongful death actions, shall be used to determine a stream of payments for each such item of damages by applying (i) the growth rate, to the (ii) annual amount in current dollars, for the (iii) period of years, all of such items as determined by the finder of fact for each such item of damages. The court shall determine the present value of the stream

of payments for each such item of damages by applying a discount rate to the stream of payments. After determining the present value of the stream of payments for future economic and pecuniary damages, thirty-five percent of that present value shall be paid in a lump sum, and the stream of payments for future economic and pecuniary damages shall be adjusted accordingly by proportionately reducing each item of the remaining stream of payments for future economic and pecuniary damages and paying those amounts over time in the form of an annuity. . . . (CPLR§5031d)

The new 50-A resolved the discount rate dilemma for medical malpractice. The legislature specified that the discount rate should be based on 10-year U.S. Treasury Bonds on the date of the verdict for awards less than 20 years. If the loss is for more than 20 years then:

the discount rate to be used in determining the present value shall be calculated by averaging, on an annual basis, the rate in effect for the ten-year United States Treasury Bond on the date of the verdict for the first twenty years and two percentage points above the rate in effect for the ten-year United States Treasury Bond on the date of the verdict for the years after twenty years. (CPLR§5031e)

Any set-offs are deducted proportionality from each element of damages including the lump-sum payments. Litigation expenses are also deducted proportionality from each element of damages and those expenses are paid as a lump sum.

After all deductions and offsets, the court determines the attorney's fees for all remaining damages including lump-sum payments and the present value of the remaining stream of payments. The attorney's fees are then deducted proportionately from each item of remaining damages including lump-sum payments and the present value of the remaining streams of payments. The attorney fees are paid as a lump sum. Adjustments netting out attorney fees are then made to both lump-sum payments and the present value of future streams of payments.

As with 50-B, the nature of the structuring process in 50-A results in a stream of payments that may be larger than awards made in other states using a traditional discounting process. How much greater depends on the facts of the case. Because aggregated losses for personal injury are no longer presented at trial under 50-A, we can't compare the stream of payment to an undiscounted aggregate amount. However, aggregated losses can be compared to the undiscounted amount presented in the report provided by the economist. The magnitude of difference depends on the same four reasons discussed for 50-B. However, one difference is that, under 50-A, there is no longer a double adjustment (the 4% additur plus growth rate for damages) for inflation except for the pain and suffering element of damages. There is still the same smoothing issue, there is a much larger lump-sum payment for future losses and pain and suffering is truncated to an eight-year maximum rather than 10 years.

C. Post-Verdict Mechanics CPLR Article 50-A Medical Malpractice Wrongful Death

In medical malpractice wrongful death commencing on or after July 26, 2003, discounted aggregated damages are presented. Total losses for each element of damages are reduced to present value, which are presented to the jury. Wrongful death medical malpractice occurring prior to July 26, 2003 would be exactly the same as Article 50-B.

Appendix C Household Service Case Law

Demonstrating performance of household services by plaintiff was stressed in *Kastick v. U-Haul Company* (2002) and *Sookraj v. Schindler Elevator Corporation* (2001). Regarding *Kastick*, the Appellate Division said that the “Supreme Court dismissed plaintiff’s wrongful death cause of action and claims for loss of household services and loss of support on the ground that plaintiff had not made out a prima facie case.” (p. 1) (See *Delong v. County of Erie*, 1983.) *Schultz v. Harrison Radiator Div. Gen. Motors Corp.* (1997) revived the “wholly gratuitous” exception rule in New York that goes back to 1880 in *Drinkwater v. Dinsmore* (1880). *Coyne v. Campbell* (1962), which provided the impetus for *Schultz*, relied on the *Drinkwater* decision. *Schultz* said:

Supreme Court erred in instructing the jury to award plaintiff the value, rather than actual expenditures on past loss of household services, where plaintiff relied on the gratuitous assistance of relatives and friends and did not incur any actual expenditure on household services between the accident and date of the verdict, and by failing to instruct the jury that only the costs of obtaining future household services necessitated by the injury, which are reasonably certain to occur, may be awarded. A damages award reflecting the value of such services did not serve a compensatory function and was improperly made. The jury should also have been instructed that future damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff’s injuries. Such an instruction does not require plaintiff to be dependent on the charity of others but merely ensures that any compensatory damages awarded to plaintiff are truly compensatory. (p. 1)

One interpretation of *Schultz* has been that, in order to claim a loss of past or future household services, an actual expenditure has to be made for past services when the plaintiff was relying on the gratuitous nature of others to perform those services. *Schultz* raised the standard for plaintiff’s claiming household service losses by requiring a foundation for such losses by showing that household services have been provided in the past and, but for the accident or death, would continue to be provided. While *Schultz* was an appellate court decision, other lower courts and some appellate courts have started to rule on the specific issue of household services. *Mono v. Peter Pan Bus Lines* (1998) was the first exception to *Schultz*, stating that *Schultz* did not apply to wrongful death cases. Thus, even if an expenditure was not made for past household services, if a foundation for such loss is established, the loss for household services starts from the date of death.

In *Mono*, the court stated: “No court has held that recovery for lost services in a wrongful death action requires that the plaintiff actually hire someone to perform the decedent’s services.” (p. 11) The court’s logic further eroded *Schultz*’s interpretation of claims for past losses when it said: “Moreover, unlike the plaintiff in *Schultz*, Henry Mono has suffered some harm from the loss of his wife’s household services: He must now perform the chores that she previously provided for him.” (p. 11) It does not say he must hire someone to perform those chores; all it says is the husband must now perform them. *Mono* suggested that if a plaintiff has to spend more time replacing the services of the decedent, then he is entitled to recover past lost household services even if no expenditures have been made or will be made in the future.

Other wrongful death cases followed *Mono*’s lead in awarding household services when no expenditure was incurred. *Bogen v. State of New York* (2001) awarded past

damages once a foundation showed that the decedent performed those services, without any evidence of how those services were replaced. *Phelan v. State of New York* (2005) ruled that the standard by which to measure the value of past and future loss of household services is the cost of replacing the decedent's services; the claimant does not have to show he hired someone to perform the decedent's services. *LaMendola v. New York State Thruway Authority* (2004) ruled that proof is not required that someone was hired to perform household services.

Co-author Spizman was allowed to testify in a medical malpractice wrongful death case to the cost of replacing household services, even though no expenditures were made for past services, over defense objections based on *Schultz (Dusel v. Nangle MD and Brundage MD, 2003)*. Since the plaintiff provided a foundation for household services performed by the deceased, the judge allowed Spizman to testify as to the cost of those lost household services.

The court of claims in *Cesnavicius v. State of New York* (2002) created an exception to *Schultz* in personal injury cases dealing with a catastrophically injured person, ruling that parents and spouses of such an injured person should be excluded from the "wholly gratuitous services and payments" rule. The court of claims in *Reed v. City of New York* (2003) allowed an economic damages expert (in a personal injury suit) to testify about past and future household services based on "the value of the loss of household services for a typical woman of plaintiff's age." The appeal in *Presler v. Compson Tennis Club Associates* (2006) was based on the trial court not allowing plaintiff testimony on future household services. There was no expenditure or claim for past services, yet the plaintiff made a claim for future services. The appeals court overruled and allowed the plaintiff to recover yearly future losses for household services even though no expenditures have been made before or since the accident. What was demonstrated was that the plaintiff performed these services in the past and could not do them in the future.

The preceding review of selected case law shows that the courts have discretionary judgment in ruling whether or not past or future household damages are allowed.